

June 10, 2020

TO: Montana Districting Commission  
FR: Joe Lamson, Commissioner

RE: Montana Constitutional Authority for Independent, Autonomous Commission

## **Commission's Constitutional Authority Clearly Established**

Fundamental to the 1972 Montana Constitution was the establishment of a five person citizen Districting and Apportionment Commission. The constitutional convention accurately concluded the Montana legislature repeatedly failed and was incapable of creating redistricting plans fulfilling the basic citizen right of "one person, one vote."

Montana voters agreed and voted to ratify the new constitution. Montana was among the first states to pioneer the use of a citizen commission to redraw legislative and congressional districts. Commissions are now used exclusively in 13 states for all redistricting and seven additional states use commissions for some part of their process. Commissions are widely recognized as a successful alternative to the many abuses and problems inherent when state legislatures control the redistricting process.

The five paragraphs found in Article 5, Section 14 of the Montana Constitution simply and elegantly establish the key functions and authority of the commission. The intention of the delegates of the Constitutional Convention and Montana voters was crystal clear.

Henceforth, the Montana legislature's role in redistricting was limited to appointing four of the five citizen commissioners and making nonbinding recommendations on the proposed plan. The constitutional authority and responsibility for redistricting is vested solely in the commission.

It has been reaffirmed through decades of legal challenges that the legislature has **no constitutional authority** to statutorily limit how the commission draws districts to meet its responsibilities in the redistricting process.

Since 1973 the commission's authority has been clearly upheld first in an Attorney General's Opinion followed by no less than three district court and two unanimous Supreme Court decisions. Every one of those court decisions have upheld the commission's authority to redistrict without any statutory interference by the legislature.

The commission derives its authority from the people of Montana who ratified the constitution. The Commission's first and undivided duty is to uphold the Montana Constitution.

## **1973 Attorney General Robert Woodahl Opinion**

Most of the discussion concerning Attorney General Woodahl's Opinion focuses on the question of whether the legislature or the commission has the constitutional authority to determine the size of the legislature.

What is overlooked in these discussions is that from the very beginnings of the first commission, the preeminent constitutional authority of the commission to create plans free from any statutory limitations by the legislature was clearly established. It was the bedrock opinion affirming the legislature can only make recommendations for redistricting plans but has no statutory authority to change them.

The Attorney General Opinion unambiguously stated, "*with the adoption of the new constitution, the people of Montana divested the legislature of all power concerning apportionment of the legislature, except for the power of recommendation cited above.*" 35 A.G. Op. 12 (1973).

## **2003 Brown v. Montana Districting and Apportionment Commission, Judge Dorothy McCarter presiding, Montana First Judicial District Court**

Events surrounding the 2000 plan submission were "contentious" indeed. They included numerous clashes between the commission majority and the legislature's Republican majority over nine pieces of legislation. During hearings on those bills, the Republican legislators repeatedly received testimony they chose to ignore that their actions were unconstitutional. Votes on all bills were split along party lines.

Besides introducing numerous bills and resolutions in opposition to the plan, House Republican legislators passed legislation to cut off funding to the commission. In addition, efforts were made to have one commissioner fired from his state agency position and threats were made to cut public education funding and state agency budgets.

Two members of the 2000 Commission, a delegation of American Indian and Democratic legislators, and citizens proceeded to the Secretary of State's Office to file the plan. They were met at the door by the Secretary of State who asserted the plan could not be filed unless it met conditions of Republican passed legislation.

The commissioners placed the plan on the front desk and declared the plan filed in accordance with their duties outlined in Article V, Section 14 (4) of the Montana Constitution.

The Secretary of State then sued the commission. In the resulting case, the commission was represented by the Attorney General and was joined by intervenors in support of the commission including American Indian legislators from all seven reservations and the Montana Wyoming Tribal Leaders Council.

Judge McCarter found the “*Secretary of State contends that this constitutional provision is intended to be implemented by the legislature. The Court disagrees, finding the provision to be **self-executing**, and needing no implementation by the legislature.*”

Judge McCarter further elaborated. “*Put another way, a constitutional provision is **self-executing** when it can be given effect without the aid of the legislature and there is nothing to indicate that the legislation is contemplated in order to render it operative.*”

Judge McCarter found just as Attorney General Woodahl before her that the legislature had a very limited role. “*The language of Article V, Section 14, does not indicate an intent to involve the legislature in this process, other than its selection of four commissioners pursuant to subsection (2), and its recommendations to the Commission pursuant to subsection (4).*”

Judge McCarter concluded the actions of the legislature and Secretary of State were “*not a valid implementation of Article V, Section 14, because that constitutional provision is **self-executing**, and because Article IV, Section 3, of the Montana Constitution does not authorize the legislature to interfere with the redistricting process beyond the express authority given to it in Article V, Section 14.*”

## **2004 Wheat, Tester, and Hansen v. Brown, Judge Jeffrey Sherlock presiding, Montana First Judicial District Court**

Additional 2003 Republican legislation tried to usurp the power of the commission to assign holdover senators. Three sitting senators sued the Secretary of State to force him to recognize the commission’s holdover senator assignments.

Judge Sherlock affirmed the “*Commission is assigned the task of redistricting and reapportioning the state into legislative districts. The history of the constitution shows the purpose of the drafters was to ‘[b]ypass the Legislature from this point on.’ (Statement of Delegate Skari, Mont. Const. Conv. Tr. Vol. IX at 682.)*”

Judge Sherlock noted Judge McCarter’s finding in *Brown v. Commission* that Article V, Section 14 of the Montana Constitution “*does not indicate an intent to involve the legislature in the redistricting process other than the selection of commissioners and its recommendations to the Commission. Judge McCarter found the constitutional provision to be **self-executing** without any need for assistance from the legislature. Although Judge McCarter’s decision is not binding on this Court, it is persuasive, and this Court adopts that same rationale.*”

## **2004 Wheat, Tester, and Hansen v. Brown, Montana Supreme Court**

Judge Sherlock's decision was appealed to the Montana Supreme Court. All seven justices of Supreme Court unanimously affirmed Judge Sherlock's decision.

Justice Leaphart wrote *"It is clear from the transcripts of the Constitutional Convention that, in recognition of the Legislature's inability to redistrict itself, the Convention assigned the task of redistricting to the Commission -- an independent, autonomous entity -- and limited the Legislature's role to that of making 'recommendations.'"*

The Court concluded *"that Article V, Section 14's mandate that the Commission effect redistricting is **self-executing** and that, as the history of implementation illustrates, the power to assign holdover senators to districts is an inherent part of the redistricting process. By granting redistricting authority to the Commission under Article V, Section 14, the Constitution denied the Legislature any latitude to invoke its plenary powers."*

## **2013 Willems, et al v. State of Montana, Judge Mike Menahan presiding, Montana First Judicial District Court**

In 2013 a group of Fergus County Republicans sued the commission concerning an amendment on the assignment of holdover senators. The plaintiff's complaint alleged seven different counts against the commission's actions.

Two of those counts dealt specifically with the unconstitutional criteria passed by the 2003 Republican legislators and codified in Section 5-1-115, MCA.

Count VI alleged the commission unlawfully considered incumbent legislators' addresses in violation of Section 5-1-115(3)(a), MCA. Count VII alleged the commission unlawfully considered previous election results in redistricting in violation of Section 5-1-115 (3)(d), MCA.

The Commission was represented by Attorney General Tim Fox and Montana Solicitor General Lawrence VanDyke. On page 28 of the Defendant's Response and Brief in Support of Cross-Motion for Summary Judgement the Attorney General's brief argued:

*"Those claims are clearly meritless in light of existing court rulings. Judge McCarter, in Brown v. Montana Districting and Apportionment Commission, has already determined that legislation attempting to limit the broad constitutional discretion of the redistricting commission, like Mont. Code Ann. Sections 5-1-115 (3) (a) and (d), 'impermissibly conflicts with Article V, Section 14 of the Montana Constitution, and is void on that basis.'"*

And further the *"Montana Constitution does not authorize the Legislature to interfere with the redistricting process beyond the express authority to appoint four commissioners and provide recommendations."*

*“To limit what the Commission may consider during the redistricting process, as the Legislature has attempted to do in MCA 15-1-115(3)(a) and (d), conflicts with the plain meaning of the Commission’s constitutionally delegated power as determined in both Brown and Wheat, and thus has no force or effect.”*

In their reply brief to the Attorney General’s response as to the unconstitutionality of Section 5-1-115 (3)(a) and (d), MCA, the Plaintiff’s withdrew both Counts VI and VII.

## **2014 Willems, et al v. State of Montana, Montana Supreme Court**

Judge Menahan’s Willems decision was affirmed by a unanimous decision by the Supreme Court. In the decision the Court reaffirmed their decision in Wheat v. Brown.

Justice Cotter wrote in “*Wheat v. Brown, 2004 MT 33, 320 Mont. 15, 85 P.3d 765, we determined that the 1972 Constitutional Convention “assigned the task of redistricting to the Commission—an independent, autonomous entity—and limited the Legislature’s role to that of making ‘recommendations.’”*

## **Conclusion**

Since 1973 three Montana Attorney Generals, Attorney General Woodahl in his issued opinion and Attorney Generals McGrath and Fox in their defenses of the 2000 and 2010 districting plans have affirmed the Commissions’ independence from unconstitutional interference by the legislature.

As reviewed above there have been three District Court decisions and two unanimous Supreme Court decisions affirming the Commission’s independence from any attempts by the legislature to use their plenary powers to limit that independence.

The constitutional convention delegates wisely created a commission as an “independent, autonomous entity” to complete legislative and congressional redistricting every ten years to fulfill the promise of “one person, one vote” upon which our representative democracy is based.